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No. 55

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In the Supreme Court of the United States

OCTOBER TERM 1969

WILLIE WADE, JR.,
Petitioner,

vs.

LAWRENCE E. WILSON, Warden, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the Respondents

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Wilson v. Wade,* 390 F.2d 632 (9th Cir. 1968), and is reprinted on pages 50-52 of the Appendix filed in this action.

The order of the United States District Court for the Northern District of California granting the petition for writ of habeas corpus on June 5, 1967, is not reported but is reprinted on pages 44-45 of the Appendix filed in this action.

JURISDICTION

The jurisdiction of this Court to review a judgment of a Court of Appeals arises under Title 28, United States Code, section 1254(1). The petition for writ of certiorari was granted on February 24, 1969. 393 U.S. 1079.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provisions, statutes and California Rules of Court, which are relevant to this action are set forth at length in appendix A of this brief.

QUESTION PRESENTED

Does an indigent state prisoner who has been afforded direct appeal with counsel and use of the appellate record have a further federal Constitutional right to be provided at state expense records of the proceedings which resulted in his custody, to be used solely for the purpose of discovering whether there may be grounds for collateral attack in a state or a federal court?

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

1. THE TRIAL COURT:

On November 1, 1960 petitioner, Willie Wade, Jr., and a codefendant, Joseph Pollard, were sentenced in the Superior Court of the State of California for the County of Los Angeles to life imprisonment upon their conviction of murder (A. 37). Petitioner and his codefendant were convicted by a jury which determined the murder to be of the first degree and fixed petitioner's penalty at death (A. 37). This penalty was reduced to life imprisonment by the trial

dge when he denied petitioner's motion for a new trial A. 37). Petitioner was represented by counsel at trial (A. 7).

THE COURT OF APPEAL:

Petitioner and Pollard each commenced proceedings on ppeal (A. 18, 24). Petitioner was represented on appeal y appointed counsel, Burton Marks, Esq. (A. 7, 18). On ugust 17, 1961 the California Court of Appeal affirmed etitioner's conviction (A. 11). *People v. Pollard*, 194 Cal. App.2d 830, 15 Cal.Rptr. 214 (1961). It appears that the lerk of the trial court sent appellants' single copy of the ecord on appeal first to Pollard[1] who subsequently declined to share it when requested to do so by Mr. Marks (A. 18). Mr. Marks then borrowed the record from the Office of the California Attorney General in Los Angeles for use on appeal, including preparation of the brief (A. 18).

3. COLLATERAL STATE PROCEEDINGS:

Some four years following the decision of the California Court of Appeal [in 1965 according to the brief for petitioner, page 5], Wade inquired and was advised by the clerk of the trial court that either Mr. Marks or the appellate court had the record on appeal (A. 11).

By letter dated May 6, 1966 Mr. Marks informed Wade that on Pollard's refusal to share the appeal record he had borrowed a copy of the record from the California Attorney General (A. 18).

Wade alleges he next sought help from his relatives but was unsuccessful because they were unable to pay for the

1. California Rules of Court, Rules 35(c) and 10(c) provide for a single copy of the record on appeal to be shared by multiple appellants in a non-death case. The full text of these Rules appears in the appendix of this brief.

record (A. 11). Wade then unsuccessfully requested the trial court, the California Court of Appeal, and the California Supreme Court to provide him various records, including the appeal record, without cost (A. 11-12, 19-30)[2].

B. Proceedings in the Federal Courts.

1. THE DISTRICT COURT:

On February 15, 1967 Wade's petition for a writ of habeas corpus was ordered filed forma pauperis in the United States District Court for the Northern District of California (A. 2, 3-30). On the same date the District Court issued an order to show cause returnable February 24, 1967 (A. 31). The petition alleged Wade's custody was unlawful because the State failed to honor his requests for free records which he made four years after his conviction was affirmed (A. 5, 10).

Respondent's return to the order to show cause was filed February 24, 1967 (A. 32-38) and Wade filed a traverse on March 22, 1967 (A. 1, 40-43).

On June 5, 1967 the District Court held that Wade was entitled to a free copy of the trial transcript to prepare a

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2. Wade's requests for records were not confined to the Reporter's Transcripts of trial. He asked the California Court of Appeal for certified copies of:

"(1) The records of arrest or reports thereof.
(2) The records of the information.
(3) Records of arraignment.
(4) Records of the preliminary hearing.
(5) Records of the trial.
(6) Records of the sentencing." (A. 20).

Wade asked the California Supreme Court for the following records:

"(1) Records of the information.
(2) Records of the arraignment.
(3) Records of the preliminary hearing.
(4) Records of the trial/Reporter's Transcripts.
(5) Records of the sentencing.
(6) Records of the arrest/arrest reports/." (A. 25).

habeas corpus petition and ordered Wade released from custody, staying execution of the order for ten days to allow filing a notice of appeal. This order was also expressly without prejudice to the State to apply to have it set aside in the event the transcript of his trial were provided (A. 44-45). The sole issue resolved by the District Court was whether a state prisoner is entitled to a free transcript to prepare a petition for a writ of habeas corpus.

On June 15, 1967 the District Court ordered the matter stayed pending the determination of an appeal and on the same date respondent filed a notice of appeal (A. 46, 47).

2. THE COURT OF APPEALS:

Following the submission of the matter on the briefs filed by the respective parties, the United States Court of Appeals for the Ninth Circuit reversed the District Court in an opinion filed March 11, 1968 (A. 50-53). *Wilson v. Wade,* 390 F.2d 632 (9th Cir. 1968). The Court of Appeals reversed the District Court, holding that Wade was not entitled to demand the transcript merely to enable him to search for flaws and determining that Wade had not presented any ground for post-conviction relief the prosecution of which required him to have the use of the transcript (A. 51).

On May 3, 1968 the Court of Appeals denied Wade's petition for rehearing (A. 54).

SUMMARY OF ARGUMENT

Petitioner Wade appealed his conviction to the California Court of Appeal. An indigent, Wade was furnished at state expense with appellate counsel who used, also without cost to Wade, a copy of the trial record in presenting the appeal. Some four years after his conviction was affirmed, Wade unsuccessfully demanded from the California courts voluminous records, including the trial transcript.

The District Court, by way of relief to Wade, directed California to provide Wade with a copy of the trial transcript. No other relief was granted. The Court of Appeals held that although an indigent prisoner is entitled to a free transcript in order to prosecute a claim for post conviction relief where it is essential to permit demonstration of his right to relief, Wade "was not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw [footnote omitted]." (A. 52).

The relief Wade seeks in this Court is not the same relief granted to him by the District Court. Here Wade asserts not only a right to a trial transcript but also a right to "a new appellate review of his original conviction in the state courts" (Petitioner's Brief, p. 26).

Wade's attack on the validity of his California appeal raises contentions not presented or passed upon by the District Court or the Court of Appeals; also the California courts have never been afforded the opportunity to consider these contentions which are urged for the first time in the brief in this Court.

The question before this Court is the asserted right of Wade, who has never stated grounds for collateral attack, to secure a copy of the trial transcript so as to conduct a search for error. For purposes of this review, Wade is in no different position than any other potential applicant for collateral relief claiming to be indigent and to be without a trial record.

Granting Wade's demand would establish for indigents unfettered privileges of post-conviction discovery which are not associated with any pending proceedings. The discovery privileges Wade demands would gravely burden government and the administration of justice in the several States.

An indigent should not be furnished records on collateral attack any more readily than counsel, an interest at least as vital. Indeed, the same considerations which now determine whether an indigent is furnished counsel should guide the determination of whether he be furnished a trial record. An indigent is entitled to counsel on habeas corpus only to advance apparently meritorious contentions. Accordingly, he should be furnished the trial record only when necessary to support apparently meritorious contentions.

ARGUMENT

I. The United States Constitution Does Not Require That an Indigent State Prisoner Be Provided a Free Copy of the Trial Record to Be Used for the Sole Purpose of Discovering Whether There May Be Grounds for Collateral Attack of His Conviction.

The California Court of Appeal reviewed petitioner's conviction upon the original trial record furnished to the reviewing court without charge to petitioner; petitioner's appointed appellate counsel used, also without charge to petitioner, a copy of the trial record for the purposes of presenting petitioner's appeal.

Petitioner has never filed a petition in any State or federal court collaterally attacking the validity of his conviction or challenging the fairness of the proceedings on appeal[3].

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3. The substantial portion of Wade's brief on the merits filed in this Court is devoted to a discussion of how the application of Rules 10(c) and 35(c) of the California Rules of Court to Wade may affect the validity of his conviction by way of impairing his right to appeal. On Argument II, *infra*, we discuss at length the reasons why this Court should not entertain these arguments which appear for the first time in petitioner's brief. They were never raised by the parties nor discussed by the courts in the proceedings in the District Court and in the Court of Appeals. Similarly, these matters were not raised in the petition for writ of certiorari or in our opposition thereto.

Wade's interest in records in the courts below was not limited to a transcript of the evidence adduced at trial. His requests have covered records of all official actions taken against him up to the time of sentencing. Some of the records Wade has requested are listed on page 20 of the Appendix (his request for records directed to the California Court of Appeal) and on page 25 of the Appendix (his request for records directed to the California Supreme Court). He has indeed embarked upon a full scale fishing expedition.

A. NO ACTUAL NEED FOR THE TRIAL RECORD IS DEMONSTRATED WHERE NO CONTENTION IS URGED WHICH REQUIRES THE TRIAL RECORD FOR SUPPORT.

A State is not required to provide an indigent in its custody with free copies of the trial record at the whim of the indigent. The cases articulating an indigent's right to a free record are based on an actual and demonstrable need for the particular records requested; in each case the specific need is either set forth or is easily inferred from the circumstances.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court discussed the importance of stenographic transcripts of trial proceedings to an indigent person's interest in prosecuting his right to full direct appellate review such as was afforded petitioner here. In holding that the due process and equal protection clauses of the Fourteenth Amendment require that the indigent defendant be provided such records without cost, this Court observed:

> "Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors. [footnote omitted]" 351 U.S. 16.

Indeed, the major premise of the *Griffin* decision is:

> "We must therefore assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript." 351 U.S. at 16.

There is no basis, however, for such an assumption of trial error with regard to Wade whose conviction was affirmed after he was afforded a full direct appeal. Wade's conviction, therefore, is presumptively valid.

This Court in *Lane v. Brown,* 372 U.S. 477 (1963), ruled the Fourteenth Amendment requires that an indigent be provided a free record where filing the record is essential to perfecting an appeal from a denial of a petition for writ of error coram nobis where under applicable state law the filing of a transcript was essential to confer jurisdiction upon the appellate court. In *Long v. District Court of Iowa,* 385 U.S. 192 (1966), this Court held an indigent is entitled to a free transcript of habeas corpus proceedings for use on direct appellate review of those proceedings. The principles announced in *Long* were recently affirmed in *Gardner v. California,* 393 U.S. 367 (1969), where the transcript of habeas corpus proceedings resulting in a denial of the petition was determined important, not to direct appellate review of those proceedings, but to the prosecution of a new petition for habeas corpus filed in a higher court[4]. In deciding *Gardner,* this Court reasoned

4. Under California practice, the petitioner for a writ of habeas corpus has no appeal where his petition was denied. Rather, the petitioner may file a new petition for habeas corpus in a higher court which in Gardner's case would be either the intermediate Court of Appeal or the California Supreme Court. See *Gardner v. California, supra,* 393 U.S. at 603.

that filing a second petition for habeas corpus in a higher court effectively commences a proceeding on review and found there was an actual need for the transcript of the original habeas corpus proceedings:

> "Since our system is an adversary one, a petitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for those who try to make out a case for a second hearing." 393 U.S. at 370.

Griffin concerns an indigent's right to records of his trial proceedings for the purpose of prosecuting direct appellate review of those proceedings. *Lane, Long* and *Gardner* involve an indigent's right to transcripts of proceedings on collateral attack to be used to prosecute review of those proceedings. In each instance the specific need for the particular records is apparent.

In *Roberts v. LaVallee,* 389 U.S. 40 (1967), the Court was confronted with a request for records to be used in criminal proceedings occurring before judgment. When Roberts' case was called to trial in New York State, he requested the Court furnish him at state expense with a transcript of a prior preliminary hearing at which the major state witness had testified. In determining the trial court's denial of Roberts' request was repugnant to the Constitution this Court stated:

> "Our decisions for more than a decade now have made clear that difference in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. See, *e.g., Draper v. Washington,* 372 U.S. 487 (1963); *Griffin v. Illinois,* 351 U.S. 12 (1956)." 389 U. S. at 42.

The statement in Mr. Justice Harlan's dissenting opinion to the contrary notwithstanding[5], it seems entirely understandable that Roberts' interest in the transcript of the preliminary hearing would relate to his preparation of cross-examination at trial of the principal prosecution witness who would testify against him. Accordingly, as was true in each of the other cases discussed above, in *Roberts* there was an apparent specific need for the particular record requested.

We hasten to point out that even if Roberts' interest in the transcript did not reflect an apparent specific need for it, the distinction between the circumstances surrounding Roberts' requests for records and those surrounding Wade's requests for records is so substantial and basic that this Court's opinion in *Roberts* would nevertheless afford Wade no comfort. Wade is presumptively guilty; Roberts was presumptively innocent. Wade is in custody under a presumptively valid judgment of conviction following a jury trial and which was affirmed on appeal. Roberts' request for records was made prior to his conviction during trial.

Where, as in the instant case, the conviction is presumptively valid and direct review proceedings have been completed, an indigent's indiscriminate, purposeless and arbitrary demand for documents need not be honored. The State, then, may properly call upon the indigent to come forward with some apparently meritorious ground for collateral attack upon which a determination of need for records can then be predicated.

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5. Mr. Justice Harlan noted in his dissent in *Roberts* "... at no time has petitioner suggested any use to which the preliminary hearing transcript could have been put, although he is in a position to know what it contains." 389 U.S. at 43.

B. GRANTING PETITIONER'S DEMAND FOR RECORDS WOULD AFFORD INDIGENTS UNFETTERED DISCOVERY PRIVILEGES.

This Court has recently decided that a state prisoner enjoys no broad rights of discovery because he is a petitioner for a writ of habeas corpus. *Harris v. Nelson,* 394 U.S. 286 (1969). The petitioner in *Harris* had filed a petition for writ of habeas corpus with allegations sufficient to warrant an evidentiary hearing. Moreover, his proposed discovery interrogatories related to the issues to be litigated at the evidentiary hearing. Nevertheless, this Court held that such discovery is available only at the authorization of the District Court according to procedures reasonably fashioned by that Court to elicit facts to help it dispose of the matter as law and justice require. *Harris v. Nelson, supra,* 394 U.S. at 298-300.

The lower federal courts which have considered the matter have uniformly rejected the thesis that an indigent prisoner is entitled to free records to be used to *discover* whether he has grounds to collaterally attack the validity of his custody or to *prepare* a petition for such relief. See *Dorsey v. United States,* 333 F.2d 1015 (6th Cir. 1964); *Harless v. United States,* 329 F.2d 397, 398-399 (5th Cir. 1964); *Culbert v. United States,* 325 F.2d 920, 922 (8th Cir. 1964); *Ketcherside v. United States,* 317 F.2d 807, 808 (6th Cir. 1963); *United States v. Shoaf,* 341 F.2d 832 (4th Cir. 1964); *McGarry v. Fogliani,* 370 F.2d 42, 44 (9th Cir. 1966)[6].

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6. It is true that, except for *McGarry,* the above cases involve federal prisoners seeking relief under federal statutes. However, it has been accurately pointed out for example that the proceedings under Title 28, United States Code section 2255 sought to be commenced in *Harless, Culbert and Shoaf,* are a procedural substitute for habeas corpus so that the indigent prisoner's interests in free records would fall within the purview of the Fifth Amendment as Wade's interest in such records similarly falls within the purview of the Fourteenth Amendment. See *United States v. Shoaf,*

On the other hand, where the requested records would predictably be useful to *support* a particular claim there has been little hesitancy to provide them. See *e.g., United States v. Glass,* 317 F.2d 200 (4th Cir. 1963). See also *United States v. Shoaf, supra,* 341 F.2d at 836 where the Court concluded its opinion by stating:

> "If [a petition for collateral relief under Title 28, United States Code section 2255] should show some non-frivolous ground, he may incidentally ask for a copy of the transcript, and it, or the relevant portion, should be supplied to him if need for it is shown." 341 F.2d at 836.

The distinction between "needing" records to *discover* grounds for collateral attack and needing them to *support* known grounds has been set forth with clarity by the Court of Appeals in *Shoaf:*

> "This case differs from Hardy [*Hardy v. United States,* 375 U.S. 277 (1964)], of course, for here we are concerned with the indigent's rights in collateral proceedings, not in direct appeals, and the transcript is sought by the indigent for his own perusal rather than that of newly appointed counsel. Those differences require a different result."
>
> • • •
>
> "The usual grounds for successful collateral attacks upon convictions arise out of occurrences outside of the courtroom or of events in the courtroom of which the defendant was aware and can recall without the

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supra, 341 F.2d at 835-836. The Court in *Shoaf* also makes the point that while there is no equal protection clause in the Fifth Amendment the minimal standards of justice applicable under the due process clause should not be appreciably lower in the federal courts than the Federal Constitution requires in the state courts. *Ibid.* This would seem to be particularly true in view of the fact that a petitioner for collateral relief may be a state prisoner seeking records to attack the validity of a federal conviction affecting his custody or he may be a federal prisoner seeking records to attack the validity of a state conviction.

need of having his memory refreshed by reading a transcript. He may well have a need of a transcript or a partial transcript to support some ground of collateral attack, but rarely, if ever, would the defendant, himself, need a transcript of the trial to become aware of the events or occurrences which constitute a ground for collateral attack.

"These differences we think are crucial. Hardy's response to the general need for the transcript was not an abandonment of the Supreme Court's repeated refusal to hold that a transcript must be furnished every indigent who seeks direct or collateral review of his conviction. Shoaf, who has undertaken to show neither specific nor general need for a transcript, would be entitled to one at government expense only if that is a requirement in every case." 341 F.2d at 834-835.

Wade, of course, should not be permitted to ride the coattails of a circumstantial result of the application of Rules 10(c) and 35(c) of the California Rules of Court, which merely provide for the distribution of the original and copies of the appeal record, by claiming that were he a single appellant he would have actually received his own copy of the record on appeal for his permanent retention. The *Griffin* line of cases establishes an indigent's rights to free records as one of *access* to whatever records are needed to vindicate his legal rights. See *Roberts v. LaVallee, supra*, 389 U.S. at 42. Those cases do not establish a constitutional right in the nature of a property right to permanent retention of the documents. While it is true that in the case of multiple appellants, a circumstantial result of the California rules may be that not all of the appellants receive personal copies of the records for their individual permanent retention it is also true that they each have an enforceable right to access to the record for purposes of

prosecuting the appeal. The fact that at the conclusion of the appellate proceedings some appellants are able to retain the record while others do not is substantially irrelevant to the purpose of providing access to the record on appeal and to any established right under the Federal Constitution. The State is not required to place in an appellant's hands, literally, a copy of his trial record for his private use or non-use.

C. RECOGNITION OF PETITIONER'S DEMAND FOR RECORDS WOULD PLACE A GRAVE FINANCIAL AND ADMINISTRATIVE BURDEN UPON THE STATES WITHOUT A COMMENSURATE BENEFIT TO PETITIONER AND OTHER INDIGENTS SIMILARLY SITUATED.

California has not been derelict in providing free records to indigents convicted of crime. Indeed, it has long been the rule in California that on direct appellate review every defendant, rich or poor, has access without cost to the record. *People v. Smith*, 34 Cal.2d 449, 211 P.2d 561 (1949). Similarly, California has long provided free records to indigents on appeal from the denial of collateral relief. *In re Paiva*, 31 Cal.2d 503, 190 P.2d 604 (1948) (appeal from the denial of a petition for writ of error coram nobis). It is also the rule in California that indigents convicted of misdemeanors be provided free trial transcripts where necessary to present contentions on appeal. *Preston v. Municipal Court*, 188 Cal.App.2d 76, 10 Cal.Rptr. 301 (1961); *In re Henderson*, 61 Cal.2d 541, 393 P.2d 685 (1964).

We are aware of no interpretation of constitutional law which would require Wade be granted the relief he requests under the circumstances of record, and we urge that there is no justification to now read into the Fourteenth Amendment the establishment of broad rights to free records for indigent persons in custody. Because the papers filed by Wade in these proceedings have set forth no allega-

tions which would give a clue as to why he feels his continuing custody may be unlawful there is no basis for assuming any particular portion of the record of the proceedings which led to his custody is more important to him than any other. Accordingly, it is virtually impossible to impute any specific benefit to Wade were the State to have honored his request for free records.

On the other hand the financial burden on government and the burdens on the administration of justice would be enormous. Wade's analysis of the financial impact of such a rule, appearing on pages 16 and 17 of Petitioner's Brief, reflects only the number of indigent codefendants who would be furnished transcripts for collateral attack. A more realistic picture of this impact in California would be framed by remembering we are talking about discovering grounds and preparing petitions for collateral attack so that every person in custody, including those in the various state prisons, the county jails, persons on parole and persons on probation, would all be eligible to make blanket demands for records as Wade has.

On December 31, 1968, for example, the California state prison population consisted of over 24,000 adults, each being a potential habeas corpus applicant. A high percentage of these prisoners would, of course, be indigent; under Wade's theory each indigent would be entitled to demand free records to search for errors. Moreover, approximately 80 percent of these inmates do not appeal their convictions. Of the 12,721 adults sentenced to state prison during the calendar years 1966 and 1967 only 2,441, or 19.2 percent, appealed. Consequently, trial transcripts have never been produced for the vast majority of recently committed prisoners as well as for countless other prisoners who in past years forsook their appeals. The State would be

inundated with demands for trial records and would be burdened with the costs associated with transcribing and reproducing trial evidence even where there are no appeals and no claims of trial error by the prisoners. The States should hardly be required to waste their funds and energies by providing what is unnecessary. See *Draper v. Washington*, 372 U.S. 487, 496 (1963).

To the extent a prisoner's challenge of the validity of his custody relates to collateral attack of a conviction, it should be noted that many of these persons have suffered more than one conviction. The financial impact on government is, of course, vastly increased by including the costs which would have to be borne by all state governments, not to mention the costs which would be incurred by the federal government were the rule proposed by Wade held applicable to persons whose custody is affected by federal convictions.

It is also reasonably foreseeable the rule proposed by Wade would work to impose a tremendous burden on the maintenance of discipline in the various prison systems. The record in these proceedings suggests that Wade is a disgruntled prisoner who is unaware of any grounds cognizable in a state or federal court for regaining his freedom. If he were permitted to conduct a fishing expedition at state expense in search for grounds for collateral attack, it is not unreasonable to assume that he, and others like him, would seek the assistance of other inmates. It requires little imagination to envision the occurrence of frequent joint discussions among inmates pouring over one or several of their compatriots' complete set of records in a search for some plausible grounds to attack their presumptively valid commitments. The significance of such an imposition on prison discipline has been recognized as recently

as the following comment from the Court's opinion in *Johnson* v. *Avery*, 393 U.S. 483 (1969):

> "It is indisputable that prison 'writ writers' like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them. [Footnote omitted.]" 393 U.S. at 488.

The broad rights which Wade proposes be established would encourage not only the illiterate prisoner whose interests are protected by the opinion in the *Johnson* case, but would also encourage the vexacious literate prisoner to repeatedly file petitions and to continue to solicit the assistance and comments of other inmates in a search by trial and error for some plausible theory of relief.

D. THE SAME CONSIDERATIONS WHICH NOW DETERMINE WHETHER AN INDIGENT IS FURNISHED WITH COUNSEL TO ADVANCE HIS CONTENTIONS ON COLLATERAL ATTACK SHOULD GUIDE THE DETERMINATION OF WHETHER HE BE PROVIDED RECORDS.

There are distinctions between an indigent's rights at trial and on direct appeal and his rights on collateral attack. It is well settled, for example, that an indigent has a constitutional right to appointed counsel to represent him both at trial and appeal. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *Swenson* v. *Bosler*, 386 U.S. 258 (1967). Moreover, the indigent is entitled to have appointed appellate counsel prepare the appeal even where it may appear there is an absence of meritorious points to raise. *Anders* v. *California*, 386 U.S. 738 (1967).

An indigent's right to counsel on habeas corpus, however, is quite different: the right to counsel in such circumstances arises only following petitioner's invoking the court's discretion by presenting allegations which are

meritorious on their face. *Eskridge* v. *Rhay*, 345 F.2d 778, 782 (9th Cir. 1965), *cert. denied*, 382 U.S. 996 (1966); *Noble* v. *Sigler*, 351 F.2d 673, 678 (8th Cir. 1965), *cert.denied*, 385 U.S. 853 (1966); *Douglas* v. *Maxwell*, 357 F.2d 320, 321 (6th Cir.), *cert. denied*, 385 U.S. 858 (1966); *United States* v. *Wilkins*, 338 F.2d 404, 406 (2nd Cir. 1964). Indeed, this Court has recently recognized that:

> "It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. [Citation omitted.]" *Johnson* v. *Avery, supra*, 393 U.S. at 488.

An indigent's right to counsel is different on collateral attack than it is at trial or on direct appeal because the conviction on which his custody is based is presumptively valid so that absent allegations meritorious on their face the need for this right is not apparent and there is no reasonable basis for assuming its existence. Indeed, in view of the presumptive validity of the conviction we assume there is an absence of such need.

The appointment of counsel rests on actual need to advance the apparently meritorious points raised. Likewise the entitlement to free records should rest on actual need to support contentions which are apparently meritorious.

II. This Court Should Not Review the Merits of Petitioner's Contention That Rules 10(c) and 35(c) of the California Rules of Court Have Deprived Him of Due Process and Equal Protection of the Laws.

Wade's argument that the validity of his appeal and, thus, of his continuing custody is impaired by the application of Rules 10(c) and 35(c) of the California Rules of Court appears for the first time in his brief on the merits

filed in this Court. An examination of the pleadings and briefs in the courts below, the order of the District Court (A. 44-45), and of the opinion of the Court of Appeals (A. 50-52) shows that the issue litigated was limited to whether Wade has a present right to a free trial transcript.[7] Indeed, there is no indication whatsoever that at the time of Wade's direct appeal either he or his counsel believed that codefendant Pollard's refusal to relinquish one copy of the record in any way impaired their ability to prosecute the points they wished to raise on appeal.

There are at least four reasons why this Court should decline to consider the arguments surrounding his appeal. First, these arguments were not decided by or submitted to the courts below. In exercising its appellate jurisdiction, in the absence of some exceptional circumstance, this Court has always been reluctant to determine issues neither decided by nor submitted below. See, e.g., *Lawn* v. *United States*, 355 U.S. 339, fn. 16 at 362-363 (1958). Wade does not urge in his brief that there is some exceptional circumstance justifying consideration of issues raised in the first instance at this stage of the proceedings.

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7. The opinion of the Court of Appeals sets forth the question presented as follows:

> "There is no doubt but that an indigent state prisoner is entitled to a free transcript for use in an appeal from his state conviction where that is needed and that he has a like right to a free transcript in order to prosecute a claim for post conviction relief where that is essential in order to permit him to demonstrate his right to such relief. See the cases cited in Roberts v. La Vallee, 389 U.S. 40, 42, . . . But the question here is whether Wade has presented any grounds for post conviction relief, the prosecution of which might require him to have the use of a trial transcript." 390 F.2d at 633.

Similarly, the order of the District Court states:

> "The question of entitlement to a transcript to prepare a petition for a writ of habeas corpus is one of first impression in this court, and the court concludes that he is so entitled." (A. 44-45).

Secondly, his arguments were neither raised nor comprised within the petition for writ of certiorari; this Court should decline to entertain them in deference to the language of Supreme Court Rule 23(1)(c) which provides in part:

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Petitioner's statements of the "questions presented" appearing in his petition for writ of certiorari and in his response to our opposition are identical and read as follows:

> "1. Is it a denial of Due Process and Equal Protection of the law to deny Petitioner the trial transcripts and records in his case for the purpose of sueing[sic] for his liberty by Habeas Corpus, simply because he is an indigent person and has no money to pay for them?
>
> "2. Is it a violation of Petitioner's First Amendment right to Petition for redress of grievance, by placing a financial obstacle between him and the instrumentalities necessary to make that right adequate and effective;
>
> (a) If so, is the petitioner entitled to be discharged from confinement because of such a violation?"

The effect of Rules 10(c) and 35(c) of the California Rules of Court on the validity of Wade's appeal is not comprised within this statement and in accordance with Rule 23(1)(c) this Court should decline to consider the matter on its merits. See, *Namet* v. *United States*, 373 U.S. 179, 190 (1963); *Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376, fn. 12 at 387 (1960); *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, fn. 1 at 96 (1958); *Lawn* v. *United States, supra*,

355 U.S. 339, fn. 16 at 363 (1958); *Irvine* v. *California*, 347 U.S. 128, 129 (1954).

Thirdly, by failing to raise the validity of Rules 10(c) and 35(c) of the California Rules of Court in a petition for writ of habeas corpus in a state court petitioner has failed to exhaust presently available state remedies with regard to that issue and therefore has failed to comply with Title 28, United States Code section 2254(b). The District Court would have been justified in declining to grant the writ on this basis had Wade raised the points in his petition for writ of habeas corpus and this is so without regard to how meritorious the points may be. It is particularly significant that there is no published opinion of a California court addressed to the validity under either the state or federal Constitution of the application of Rules 10(c) and 35(c) of the California Rules of Court to multiple appellants. This circumstance constitutes a particularly strong justification for this Court to decline to entertain these matters on their merits so that the California courts may have the opportunity to do so in the first instance.

Fourthly, had petitioner raised these matters in either the District Court or in the Court of Appeals we would have urged that federal review is barred by reason of his failure to have raised the matter in the state court during the proceedings on his direct appeal, thus constituting a deliberate bypass of presently available state remedies. See *Nelson* v. *People of State of California*, 346 F.2d 73 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965); *Wilson* v. *Gray*, 345 F.2d 282 (9th Cir.), *cert. denied*, 382 U.S. 919 (1965); *Rhay* v. *Browder*, 342 F.2d 345 (9th Cir. 1965). As previously noted, it has long been the rule in California that on appeal a person such as Wade is entitled to free records without regard to his financial status. *People* v. *Smith*,

supra. Similarly, Rule 10(c) of the California Rules of Court provides the judge or clerk at his direction may prescribe the manner in which the single copy of the record on appeal will be made available to both appellants. Reading together the right established in the *Smith* case and Rule 10(c) it is clear that Wade had a right enforceable under then existing California law to access to the record on appeal for purposes of prosecuting the appeal. Had Wade, or his appellate counsel, been of the opinion that their use of a different copy of the record in any way impaired the prosecution of the points they wished to raise on appeal they need only have called this to the attention of the California court in order to obtain appropriate relief. However, on the face of the record filed in this Court it is most reasonable to assume that at the time of the proceedings on appeal neither Wade nor his appellate counsel had any such misgivings. Indeed, by their failure to have sought appropriate relief at the time of the proceedings on appeal we have an affirmative indication that Wade's bypass of available state remedies was deliberate.

Accordingly, in view of the absence of any exceptional circumstances justifying this Court's considering the arguments raised in the first instance in Wade's brief, and because there are compelling reasons for requiring him to give California state courts the first opportunity to litigate these questions, this Court should decline to consider the merits of this contention that Rules 10(c) and 35(c) of the California Rules of Court are unconstitutional either on their face or as applied to Wade.

III. Rules 35(c) and 10(c) of the California Rules of Court Are Not Unconstitutional on Their Face and Their Application to Wade's Appeal Did Not Deprive Him of Due Process or Equal Protection of the Laws Under the Fourteenth Amendment.

A. THE RULES OF COURT COMPLY WITH THE STRICTURES OF THE FOURTEENTH AMENDMENT.

The requirements of the Fourteenth Amendment are set forth succinctly in *Roberts* v. *LaVallee, supra,* 389 U.S. 40 (1967):

> "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. See, e.g., Draper v Washington, 372 US 487 . . . (1963); Griffin v Illinois, 351 US 12 . . . (1956)." 389 U.S. at 42.

California law has provided for over two decades that every convicted felon is entitled to access to a record on appeal regardless of his financial circumstances. E.g., *People* v. *Smith, supra,* 34 Cal.2d 449, 211 P.2d 561 (1949); *In re Paiva, supra,* 31 Cal.2d 503, 508, 510, 190 P.2d 604 (1948).

Where there are two or more defendants who appeal each has a right to full access to the record. Rule 35(c) of the California Rules of Court provides in part:

> "Where there are two or more appealing defendants represented by separate counsel in a case in which judgment of death has not been rendered against any defendant, the appellant's copy [of the Clerk's and Reporter's Transcripts] shall be made available for the use of the appellants in the manner provided in rule 10." Rule 35(c), California Rules of Court.

Rule 10(c) provides for appellant's use of his copy as follows:

"The additional copy of the record required by these rules shall be made available for the use of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the superior court." Rule 10(c), California Rules of Court.

Reading the rules together with the California Supreme Court's interpretation of them in the *Smith* case and the *Paiva* case, every convicted felon in California is thereby entitled as a matter of right to access to a free record for purposes of prosecuting his appeal. More is not required by the Fourteenth Amendment.

B. THE RULES OF COURT WERE NOT UNCONSTITUTIONALLY APPLIED.

The California rules were not applied to Wade during the proceedings on his direct appeal in a manner which impaired his right to appeal.

Because this issue was not raised on its merits prior to the brief filed by petitioner in this Court, we are required to deal with an incomplete factual record. Wade, nevertheless, has made assertions of fact outside the record to present as strong a case as possible to this Court.

1. Wade alleges on page four of his brief that appointed counsel, "who was unfamiliar with the trial proceedings, was *forced* to prepare his brief on appeal by borrowing the transcript from his opponent, the California Attorney General (A. 18)." Wade's reference to page 18 of the Appendix reveals a letter to him by his appellate counsel wherein counsel does no more than recite the fact that he borrowed transcripts from the Attorney General in Los Angeles. It has never, of course, been urged that this copy of the record

varied from the original or the one in possession of co-defendant Pollard. Moreover, we do not know why counsel elected to borrow the record from the Attorney General rather than addressing a request for appropriate relief to the state court.

2. Similarly, Wade asserts on page twenty of his brief: "In the instant case neither the trial judge nor his clerk made any effort to insure that the transcript would be fairly shared by petitioner and his co-defendant Pollard . . . . Where the State of California neglects to enforce its own rule so as to require co-defendants to share transcripts where it has denied them their own transcripts, it must, as a matter of basic fairness, make a duplicate transcript available to the co-defendant who has been denied the opportunity to review his transcript."

Wade, of course, fails to mention that there is no indication that Pollard's reluctance to share the record on appeal was called to the attention of any court during the appellate proceedings. As we have noted above, an appellant in California has an enforceable right to access to the record on appeal.

3. Wade further alleges on page four of his brief that "petitioner's appellate counsel was, upon his own request, relieved as counsel *prior to* determination of petitioner's appeal (A. 11, 41)." There is no support in the record for this allegation. Indeed, Wade's reference to page eleven of the Appendix indicates the contrary is true. That reference directs this Court to a reproduction of Wade's petition for a writ of habeas corpus filed in the District Court where it is alleged: "The Appellate Court Affirmed the conviction of the Superior Court of Los Angeles County, on August 17, 1961, and relieved the court-appointed counsel on

his own request." This allegation does not indicate at what time subsequent to the decision counsel was relieved.[8]

4. Similarly, Wade claims on page 24 of his brief: "That counsel—who had not participated in the trial of this case—voluntarily requested permission to withdraw, from the case on appeal, and *thereafter* petitioner was not in a position to review the record himself for the purpose of prosecuting his own appeal or to take further steps to secure a rehearing or a hearing in the California Supreme Court." As we pointed out above, Wade's allegation in his petition filed in the District Court does not indicate at what time subsequent to the decision appellate counsel was relieved. Moreover, in view of the fact that appointed counsel on appeal was not relieved by the court prior to issuance of the remittitur on October 17, 1961, it is apparent that Wade was represented by counsel during the time within which a petition for rehearing could be filed in the Court of Appeal or a petition for hearing could be filed in the California Supreme Court.[9]

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8. Petitioner's counsel was not relieved prior to issuance of the remittitur on October 17, 1961. See Certificate of Clerk of California Court of Appeals, Appendix B to this brief.

9. Rule 27(b) of the California Rules of Court requires that a petition for rehearing be filed within fifteen days of the date of decision, Rule 28(b) of the California Rules of Court requires that any petition for hearing in the California Supreme Court be filed within ten days after the decision of the Court of Appeal becomes final and Rule 24(a) of the California Rules of Court provides that a decision on appeal becomes final thirty days after the date it is filed. Thus, a petition for rehearing would have had to have been filed by August 17, 1961 and a petition for hearing by September 26, 1961. In view of the fact that counsel on appeal was not relieved prior to the issuance of the remittitur on October 17, 1961, it is apparent Wade was represented by counsel during the period within which he could have filed these petitions.

The record filed in this Court is, of course, inadequate to permit a determination of the merits of Wade's points without also engaging in gross speculations. However, the record does clearly show that Wade had appointed counsel on appeal, that counsel had actual use of the record on appeal and that he in fact filed a brief.

Lastly, Wade indicates the failure of the state to provide him a copy of the record for his individual permanent retention operated to impair his Fourteenth Amendment rights by precluding his taking steps to secure a rehearing in the California Court of Appeal following determination of his appeal or a hearing in the California Supreme Court. This contention should not now be considered by this Court for the reasons set forth in Argument II, *supra*, and for the additional reason that the record is inadequate to permit a determination of the matter in Wade's favor without also engaging in more conjecture.

In Wade's case there is not the slightest hint that at the time of the proceedings on appeal either he or his counsel had any desire to prepare such petitions. Indeed, several years passed before Wade expressed any interest in exploring the validity of his custody. We are left to speculate, for example, as to what would have been the result had Wade timely expressed to the state appellate courts an interest in preparing pro se petitions for rehearing or hearing and had requested access to a copy of the record on appeal for this purpose. In *Burns v. Ohio*, 360 U.S. 252 (1959), it was held the rights articulated in *Griffin* precluded the State of Ohio from requiring a filing fee of an indigent in order for him to obtain a second but discretionary appeal which under state procedure followed an appeal as of right. Even though vital, this Court would never have considered the claims raised in the *Burns* case had Burns not made

an attempt to vindicate his rights under state law and had that attempt frustrated by his financial inability to pay the filing fee. Wade's failure to have requested access to the record on appeal for purposes of preparing pro se petitions for rehearing and hearing should deprive him of any standing to urge in this Court that California law was applied to him so as to deprive him of access to the record for these purposes.

Moreover, we cannot now assume that because Wade did not have his own personal copy of the record on appeal any petition for rehearing in the Court of Appeal or for hearing in the California Supreme Court was automatically precluded. At the time of the proceedings on appeal Wade had counsel and counsel in fact had access to the record on appeal. As we have noted above (fn. 8, *supra*), appellate counsel was not relieved prior to the date of issuance of the remittitur on October 17, 1961, well after the time within which any petitions for rehearing or hearing could have been filed (see fn. 9, *supra*). Accordingly, it would be proper for this Court to presume Wade's interests on rehearing or hearing were protected by the continuing services of appointed counsel who was in a position to knowledgeably determine whether the pursuit of such relief would be appropriate. See *Norvell v. Illinois,* 373 U.S. 420, 423, 424 (1963).

The record filed in this Court is inadequate to show a denial of Wade's appellate rights under the Constitution. Indeed, there is no indication of record of any attempt on the part of Wade to invoke during the proceedings on appeal any of his rights to access to records enforceable under California law. Accordingly, this Court should either reject Wade's claims or decline to entertain them on their merits.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals should be affirmed.

Dated: San Francisco, California, August 15, 1969

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(Appendices Follow)

Appendix A

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

United States Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code—Title 28

§ 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

§ 2254(b).

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

§ 2255.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant

a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Supreme Court Rules

Rule 23.

1. The petition for writ of certiorari shall contain in the order here indicated—

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

California Rules of Court

Rule 10(c).

[Use of copies] The additional copy of the record required by these rules shall be made available for the use

of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the superior court.

Rule 24(a).

[When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

Rule 27(b).

[Time for filing petition] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court must serve and file a petition therefor within 15 days after the filing of the decision.

Rule 28(b).

[Time for filing petition] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of the transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of three copies of a printed petition or a petition prepared by other process of duplication in lieu of printing or one copy of a typewritten petition to the clerk of the Court of Appeal which rendered the decision. When such copies are delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

Rule 35(c).

[Certification] As soon as both the clerk's and reporter's transcripts are completed, the clerk shall deliver one copy to the defendant or his attorney and one copy to the district attorney, and note the dates of such deliveries on the original. When there are two or more appealing defend-

ants in a case in which a judgment of death has been rendered against one or more of the defendants, the clerk shall deliver a copy of both transcripts to each such defendant or his attorney. Promptly thereafter, and in no case longer than 25 days after the filing of the notice of appeal, unless an extension is granted pursuant to subdivision (d) of this rule, the clerk shall deliver the original transcripts to the judge for his approval. Unless a proposed correction is served and filed within five days after delivery of the original transcripts to the judge, the judge shall certify on the original that no objection was made thereto within the time allowed by law, and shall immediately redeliver the transcripts to the clerk. If a proposed correction is filed, the judge shall promptly determine the matter. After corrections have been made, the judge shall certify that all objections made thereto have been determined, and that the transcripts have been corrected in accordance with such determination, and shall redeliver the transcripts to the clerk. Where there are two or more appealing defendants represented by separate counsel in a case in which judgment of death has not been rendered against any defendant, the appellant's copy shall be made available for the use of the appellants in the manner provided in rule 10.

Appendix B

In the Court of Appeal of the State of California
Second Appellate District, Division Two

2 Crim. No. 7496

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
WILLIE WADE, JR.,
Defendant and Appellant.

CERTIFICATION

I, Clay Robbins, Jr., Clerk of the Court of Appeal for the Second Appellate District, do hereby certify the appellate docket in this case shows that:

1. Pursuant to the request of appellant, Willie Wade, Jr., for appointment of counsel, Burton Marks, Esq., was appointed on February 6, 1961 to represent appellant on his appeal;

2. Appellant's Opening Brief on appeal, signed by Burton Marks, was filed April 12, 1961 and Respondent's Brief was filed June 30, 1961;

3. On August 10, 1961 oral argument was waived and the cause submitted on the briefs;

4. The opinion of the Court of Appeal was filed August 17, 1961;

5. The remittitur issued October 17, 1961 and on October 18, 1961 Burton Marks, counsel for appellant, filed a request for fees;

6. There is no indication of record that either appellant or Mr. Marks requested the court to relieve Mr. Marks as counsel on appeal;

7. Mr. Marks was not relieved by the court as counsel on appeal prior to October 17, 1961 the date the remittitur was issued.

Dated: August 11, 1969

/s/ CLAY ROBBINS, JR.
Clay Robbins, Jr., Clerk